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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. TONY ANTONIO FRANCO, Defendant and Appellant.	E069473 (Super.Ct.No. FSB1200834) OPINION

APPEAL from the Superior Court of San Bernardino County. Jon D. Ferguson, Judge. Affirmed.

Jennifer Peabody, under appointment by the Court of appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Steve Oetting and Kristen Ramirez, Deputy Attorneys General, for Plaintiff and Respondent.

At trial, the prosecution presented evidence that defendant and appellant Tony Antonio Franco stabbed the mother of his then-three-year-old daughter to death in her car, an act the child witnessed from the back seat. A jury acquitted Franco of first degree murder, but found him guilty of second degree murder.

On appeal, Franco argues the trial court violated his federal constitutional rights by excluding from evidence a video-recorded interview with the child, conducted by a social worker a few weeks after the stabbing. He contends that his trial counsel provided ineffective assistance by failing to object on federal constitutional grounds to the exclusion of the child's interview statements, and also by failing to call the child, who was eight years old at the time of trial, to testify. He further contends his trial counsel provided ineffective assistance by failing to object to the admission of evidence of a bloody jacket belonging to the victim, which was found in Franco's apartment. Finally, he contends the trial court's finding pursuant to Vehicle Code section 13350 that a motor vehicle was used in the commission of the offense was erroneous.

We find no error, and affirm the judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

Franco met the victim in 2007 and began living with her by moving into her parents' house in June 2008, after the child was born. The couple moved into their own apartment in September 2011. They separated in January 2012, when the victim, the child, and the victim's son from a previous relationship moved back to the victim's parents' house.

On the morning of February 23, 2012, Franco and the victim separately drove to a parking lot near a fast food restaurant in Fontana. Surveillance video showed the victim entering the restaurant with the child, going into the restroom, leaving the restaurant, then reentering by herself, picking up food from the counter, and leaving again. Her first entry into the restaurant was at about 10:11 a.m.; her second entry was at about 10:15 a.m.

On the same date, at approximately noon, Franco drove the victim's vehicle into the ambulance bay of Loma Linda University Medical Center (Loma Linda), honking the horn. Loma Linda is about 15 miles from the restaurant in Fontana. The victim was next to him, between the driver's seat and the driver's side door, and the child was in the back seat. Both Franco and the victim were covered in blood. The victim was pale and unconscious; she "appeared dead" to one of the responding paramedics. Franco had lacerations on his arm, and he told the paramedics that that they had been stabbed. The child did not have any injuries but appeared to be in shock.

The victim was pronounced dead shortly after arriving at the hospital. A forensic pathologist, who testified at trial, later determined that the manner of death was homicide. The victim had a contusion on the right side of her chin, and had sustained a stab wound to the right side of the base of her neck, which punctured her aorta. The pathologist opined that the victim's injuries could not have occurred accidentally and required "some force."

Franco sustained three lacerations on his left forearm. His wounds were closed with staples, and he was released from the hospital the same day. The pathologist opined

that Franco's wounds could have been self-inflicted, or could have occurred accidentally while removing the knife from the victim's body.

Franco was charged with first degree murder. The prosecution's theory was that the killing was motivated by Franco's desire to have full custody of the child.

Franco testified at trial. He conceded that his initial statements to law enforcement—first claiming not to remember what happened, then claiming that he and the victim had been attacked by an unknown third party—were lies. He testified that he and the victim had agreed to meet that morning to schedule doctor appointments for the child, who had ongoing health issues, and to discuss her medical treatment. They did so while sitting in the victim's car in a parking lot near the fast food restaurant. But when the discussion turned to custody issues, an argument started.

According to Franco, the victim initiated the physical violence. He testified that at one point, as they were arguing but also driving across the parking lot toward the restaurant so the child could use the restroom, Franco mocked the victim verbally. The victim "flipped" and started hitting and punching him. Franco continued to taunt the victim verbally, and she pulled a knife out and cut his arm. They then struggled over the knife. As they were struggling, the vehicle drove over a curb and through a vacant lot next to the restaurant. After Franco managed to bring the vehicle to a stop by pushing the victim's foot off the accelerator and putting the vehicle in park, both Franco and the victim said that they were bleeding. Franco then slid the victim to the side and drove the vehicle to Loma Linda.

Franco testified that he did not notice when the victim was stabbed with the knife, or when the knife was removed from her body. He also testified that he did not know what happened to the knife, stating that it "should still be in the vehicle." But during the police investigation, the knife that fatally injured the victim was not recovered.

The jury acquitted Franco of the charged offense of first degree murder, but found him guilty of the lesser included offense of second degree murder. The trial court denied Franco's motion for a new trial, and sentenced him to a prison term of 15 years to life.

II. DISCUSSION

A. *Exclusion of Child's Statement*

1. *Additional Background*

The child was interviewed by a social worker on March 14, 2012, about three weeks after the victim died and about three months before the child's fourth birthday. The interview was video recorded, and both the video and a transcript are included in our record. During the interview, after some preliminary questions, when the child was asked, "Tell me about your mom," she responded, "Um they was fighting. [¶] . . . [¶] And they were bleeding. [¶] . . . [¶] And my dad was bleeding too. [¶] . . . [¶] . . . and my mom too. [¶] . . . [¶] And they went to Loma Linda."

During further questioning, the child explained that the three of them were eating in her mom's car near the restaurant when her mom and dad began to fight. She stated that "they were screaming," saying "that my dad would take care of me . . . [¶] . . . [¶]

. . . and my . . . mom was, was walking away from my dad. [¶] . . . [¶] . . . and he would never take" the child and her older brother.[1]

When asked "how did your mom start to bleed? Did something happen to her?" the child responded, "My dad make her bleed." To the follow-up question "How did he make her bleed?" she said, "She bleed by herself. [¶] . . . [¶] And my dad too." But when the child was asked again how her mom and dad got "owie[s]," she described a "blue thing" that "clicked," which people use "to cut things." The child said that the blue thing clicks "with a finger," and was in her mom's car. The social worker asked if anyone used "the blue thing that clicks," and the child responded, "My dad did. [¶] . . . [¶] He clicked it."

According to the child, the "cut thing" was initially in the trunk of the car. When the social worker asked "who had the cut thing first, who got it first?" the child responded, ". . . my mom. [¶] . . . [¶] And my dad got it from my mom. [¶] . . . [¶] And she was gonna cut my dad."[2] The social worker asked the child how she knew her mom was going to cut her dad, but her response is difficult to understand, perhaps a recollection of what was being said in the car at that time: "That, that we can't fight, that

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[1] The transcript of the interview in our record is imperfect. The transcript here reads "And, and he would (unintelligible) take (unintelligible) of me." Our review of the recording, however, shows that the child said, "And, and he would never take [victim's son's name] and me."

[2] The transcript is again incorrect here. According to the transcript, the child said, "And he was in the cut, my dad." The social worker's next question, "Who was going to cut your dad?" only makes sense if the child said, "And she was gonna cut my dad," and our review of the recording shows that to be what she said.

we can't do other things." The social worker then asked how her dad got the "cut thing" from her mom. The child responded by showing that her mom was "hiding it" in a closed fist, and her dad tried to "open it" (the mom's fist) "[a]nd then he got it."

Later in the interview, the social worker asked the child if her parents did "any hitting" on the day at issue. The child responded that her mom hit her dad, and that her dad hit her mom. When asked how her dad hit her mom, the child responded, "With that thing, the, he, my dad say don't make me cut you in the face." The social worker asked what the child's mom said in response, and the child answered, "that she didn't care."

The child was not able to give any information about what had happened to the knife. The social worker asked the child, "your mom had [the knife] and then your dad and then what happened to it?" The child responded, "And my, and my dad said don't make me cut you in the face. [¶] . . . [¶] And that was it."

In May 2017, prior to trial, defense counsel filed a motion in limine to exclude any testimony from the child. The prosecutor responded that she had no intention of calling the child to testify. Later, after the jury was sworn in but before trial had commenced, the defense requested to withdraw the motion in limine. The court allowed the defense to "pursue presenting that evidence," and the prosecution indicated that it would investigate having the child declared unavailable to testify pursuant to Evidence Code section 240.[3]

[3] Evidence Code section 240, subdivision (c) provides that a witness is unavailable to testify if expert testimony establishes that physical or mental trauma resulting from an alleged crime is of sufficient severity that the witness is "physically unable to testify or is unable to testify without suffering substantial trauma."

The next day, the prosecutor reported to the court that she had spoken briefly to the child's psychologist, who was "vehemently opposed" to the child testifying because doing so "would cause new trauma to her."

After the prosecution had presented its case in chief, the trial court returned to the issue of the admissibility of the interview. The court remarked that, despite the child's age, it was inclined to "find her competent" as a witness, but noted that it was a "close call." The prosecutor and defense counsel represented to the court that they had met with the then-eight-year-old child, and they agreed that the child had no independent recollection about the circumstances of her mother's death. The child also did not remember participating in the video-recorded interview. On that basis, the trial court determined that the interview was inadmissible under any potentially applicable hearsay exception, such as the exceptions for prior inconsistent statements or past recollections recorded. (See Evid. Code, §§ 1235, 1237, subd. (a)(3).) It observed that, particularly in light of the "borderline competency issue," it had to be "hypervigilant about making sure the foundation requirements are met . . . in establishing the reliability of the statement." The court ordered that the statement be excluded from evidence.

After the jury returned its verdict, the trial court appointed new counsel to represent Franco in making a new trial motion. The written motion argued, among other things, that Franco should have been allowed to call the child as a witness. During oral argument, defense counsel expanded on this argument, asserting that trial counsel had provided Franco ineffective assistance by failing to call the child as a witness to see if her recollection could be refreshed, so that the interview might be admitted. The trial court

explained that it had not denied any request to bring the child into court as a witness, but rather relied on the parties' stipulation that counsel would meet with her privately, and their stipulation based on that meeting regarding her lack of memory. The trial court also opined that "if [the interview] had come in, I don't think it would have been helpful to the defense, quite honestly." The trial court denied the new trial motion.

2. *Analysis*

Franco does not dispute that the trial court correctly applied California's hearsay rules when it excluded the child's interview from evidence. Rather, he contends that "this is an unusual case where his [federal] constitutional right to present a defense should trump state evidentiary hearsay rules." We reject Franco's contention.

Franco relies primarily on three federal cases, in which state evidentiary rules had excluded evidence of out-of-court statements exonerating the defendants. In *Chambers v. Miss.* (1973) 410 U.S. 284 (*Chambers*), Chambers was denied the opportunity to cross-examine a witness who had previously confessed in writing to the shooting for which Chambers had been convicted, as well as to examine three witnesses to whom the shooter also had confessed. (*Id.* at pp. 291-293.) In *Green v. Georgia* (1979) 442 U.S. 95 (*Green*), two coperpetrators, Green and Moore, abducted the victim and, "acting either in concert or separately, raped and murdered her." (*Id.* at p. 96.) Green was not permitted to introduce the testimony of a friend of Moore, who was prepared to state that Moore had confided in him that he (Moore) had killed the victim after sending Green away to run an errand. (*Ibid.*) And *Chia v. Cambra* (9th Cir. 2004) 360 F.3d 997 (*Chia*) involved a conspiracy to ambush, rob, and kill two agents of the federal Drug Enforcement

Administration. (*Id.* at p. 999.) One of the shooters made several out-of-court statements to law enforcement that Chia had nothing to do with the conspiracy, and indeed had tried to talk him out of the plot. (*Id.* at p. 999.) In each of these three cases, the federal courts held that the hearsay statements should have been admitted to evidence on federal constitutional grounds, state evidentiary rules notwithstanding. (*Chambers*, *supra*, at p. 302; *Green*, *supra*, at p. 97; *Chia*, *supra*, at p. 1003.)

There are fundamental differences, however, between the hearsay statements at issue in *Chambers*, *Green*, and *Chia*, and the child's interview in this case. In the three federal cases, the statements are all straightforwardly exculpatory—essentially, "I did it," in *Chambers* and *Green*, and "He didn't do it," in *Chia*. The evidentiary significance of the child's interview here is much more ambiguous. There are aspects of the interview that arguably support the defense's theory that Franco acted in self-defense or in a sudden quarrel/heat of passion. For example, the child reported that the victim had the knife first and was going to cut Franco, before he took the knife from her. But the child also reported that the victim was "hiding" the knife in her hand, demonstrated how Franco pried open the victim's fist to get the knife, and described how Franco "clicked" the knife open. These statements arguably suggest that even if the victim had the knife first, it was Franco who escalated their physical struggle from hitting or wrestling to cutting and stabbing. The child also reported statements by Franco that may suggest a more deliberate, intentional form of violence: "don't make me cut you in the face." The probative value of the child's interview for the defense, therefore, is questionable, which

weighs against a finding that Franco's constitutional rights were violated by the exclusion of the evidence.

Additionally, the hearsay statements at issue in *Chambers*, *Green*, and *Chia* were all made in circumstances that led federal courts to view them as inherently reliable. *Chambers* and *Green* involved spontaneous statements against the speaker's penal interest, without any motive to exonerate or implicate anyone else. (See *Chambers*, *supra*, 410 U.S. at pp. 291-293; *Green*, *supra*, 442 U.S. at p. 96.) In *Chia*, too, the majority viewed the statements at issue to "bear strong indicia of reliability," namely, at least some of the statements were made when the speaker believed he was in real danger of imminent death, and all of the statements were self-inculpatory. (*Chia*, *supra*, 360 F.3d at pp. 1004-1006; but see *id.* at pp. 1008, 1012-1013 (dis. opn. of Brunetti, J. [disagreeing that statements had sufficient indicia of reliability]).)

The child's interview statements do not bear the same indicia of reliability as the statements at issue in *Chambers*, *Green*, and *Chia*. Obviously, they are not against her penal interest, and are not anything like a dying declaration. To be sure, there is nothing in the record to suggest that the child was being anything other than completely honest about what she perceived. Nevertheless, as the trial court noted, because of her age, her competency as a witness was a "close call." In our view, the child's statements are likely reliable evidence of *what* happened—her dad made her mom bleed, as she put it—but much less reliable evidence of *why* it happened, that is, the mens rea applicable to Franco's actions. That level of understanding of adult behavior is generally beyond the experience of someone so young.

Moreover, to a significant extent, the United States Supreme Court has limited the significance of *Chambers* and its progeny, which include *Green* and *Chia*, to their facts. In *Montana v. Egelhoff* (1996) 518 U.S. 37, 52, it described *Chambers* as "an exercise in highly case-specific error correction." The California Supreme Court, too, has observed that "*Chambers* is closely tied to the facts and the Mississippi evidence law that it considered." (*People v. Ayala* (2000) 23 Cal.4th 225, 269.) Franco has not cited, and we have not discovered, any case similar on its facts to this one, in which the exclusion of hearsay evidence analogous to the child's interview has been found to be a violation of the defendant's federal constitutional rights.

We conclude that defendant's federal constitutional rights were not violated by the exclusion of the child's interview, which was not clearly exculpatory and not entirely reliable, pursuant to California's evidentiary rules regarding the admissibility of hearsay evidence.[4]

B. *Ineffective Assistance of Counsel*

Franco contends he received ineffective assistance of counsel at trial. To establish ineffective assistance of counsel, a defendant must show (1) defense counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) defense counsel's performance prejudiced the defendant, i.e., there is a "reasonable probability" that, but for counsel's failings, defendant would have

[4] It follows that Franco's trial counsel did not provide ineffective assistance of counsel by failing to object on federal constitutional grounds to the exclusion of the child's interview, since such an objection would have been properly overruled. We therefore reject Franco's argument to that effect.

obtained a more favorable result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694; *People v. Bolin* (1998) 18 Cal.4th 297, 333.) Generally, a reviewing court does not second-guess trial counsel's strategic and tactical choices. (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1059.) There is a "'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437.)

1. *Failure to Call Child as a Witness*

Franco faults his trial counsel for failing to call the child as a witness, contending that there "could be no tactical reason for counsel's failure to call [her] into court to make a record and determine whether [she] could remember anything regarding the incident, determine whether her recollection could be refreshed, or whether she could affirm that her statement to police would have been truthful." We disagree.

First, there are myriad reasons why counsel for a defendant charged with murder might prefer that the young child of the victim not be examined as a witness during trial, absent a clear indication that the child has exculpatory testimony to offer. Among other things, even the most gentle questioning might well result in an emotional response by the child that would not tend to help the defendant's cause.

Second, counsel does not render ineffective assistance by failing to take actions that counsel reasonably determines would be futile. (See *People v. Price* (1991) 1 Cal.4th 324, 387.) Franco's trial counsel reasonably could have decided that attempting to extract useful testimony from the child would be futile. Representatives of both the prosecution and the defense met with the child off the record, and they agreed that she

had no memory of the events that led to her mother's death, or of her interview with the social worker about those events. There is no basis in the record for us to second guess this analysis of the situation. Nothing more than speculation supports the notion that the child's recall might be better, or that her recollection could be refreshed, if she were questioned in court, rather than in a private meeting with counsel. Moreover, Franco's counsel may well have been persuaded, after meeting with the child, that the prosecution would be successful in having the child declared unavailable pursuant to Evidence Code section 240 if the defense attempted to call her to testify.

Third, as noted above, while there is reason to conclude that some aspects of the child's interview statements could benefit the defense, there also is reason to conclude that aspects would benefit the prosecution. It is possible that, if the child's memory were refreshed, some of the ambiguities and unclear portions of her interview statements could be explained. But there is no way of knowing whether doing so would inure to the benefit of the prosecution or the defense. The child apparently observed Franco pry open the victim's fist to obtain the knife, and then observed him click open the knife. Defense counsel might reasonably have concluded that the risks of exploring on the stand what, if anything, might be refreshed in the child's memory outweighed any likely benefit.

We conclude Franco has failed to demonstrate ineffective assistance of counsel on the basis of his counsel's choice not to attempt to call the child to testify at trial.

2. *Failure to Object to Evidence of Victim's Jacket*

a. *Additional Background*

Prior to trial, the defense filed a motion in limine to exclude any mention of a bloody jacket belonging to the victim that was found in Franco's apartment, arguing that it was irrelevant to the charged offense. The prosecution indicated that it did not intend to introduce evidence of the jacket, but acknowledged the possibility that its position could change during trial. The trial court reserved ruling on the issue, stating "we'll address it if the need arises."

At trial, the prosecutor raised the issue of the bloody jacket in its cross-examination of Franco. Franco identified the jacket as one belonging to the victim, which he believed had been in a trash bag in the living room or bedroom of his apartment.[5] He testified that the blood on the jacket came from a bloody nose he had suffered as a result of a car accident. Franco's counsel did not object to the prosecution's questions about the jacket or the admission of a picture of it.

During redirect examination, defense counsel asked Franco about the bloody jacket. Franco testified that he had been in a car accident on February 18, 2012 (five days before the victim's death). He suffered injuries to his nose and mouth. He used the victim's jacket, which had been in the car, to clean and cover himself. Pictures of

[5] The law enforcement officer who recovered the jacket initially testified that the trash bag with the jacket inside was found hidden inside the box springs of a bed when the victim's family was removing her belongings from Franco's apartment. The trial court, however, sustained a defense hearsay objection to this testimony and struck the evidence, instructing the jury not to consider it.

Franco's car from after the accident and of his injured face were introduced into evidence.

During the People's rebuttal case, a law enforcement officer testified that on February 27, 2012, he had been called back to Franco's apartment by the victim's family, who had been there to move out items that belonged to her. The officer recovered a trash bag, which had the bloody jacket in it. On cross-examination, the officer testified that he had compared the jacket to the surveillance video of the victim at the restaurant, and determined that it was "[n]ot what she was wearing at that time."

The parties later stipulated that DNA testing showed that the blood on the jacket was from a male.

During closing arguments, the prosecutor noted evidence that Franco's apartment was about four miles away from the location near the restaurant where the victim was stabbed—a substantially shorter distance than the approximately 15 miles to Loma Linda—and that a jacket belonging to the victim, covered with blood, was recovered from the apartment. The prosecutor did not specify what inference she wanted the jury to make from those facts. During the defense's closing remarks, Franco's counsel argued that the evidence showed a reasonable, innocent explanation for the victim's bloody jacket being in Franco's apartment. Counsel argued that if the prosecution wished to prove Franco cut his own arm and left the bloody jacket at his apartment after stabbing the victim, it should have introduced video showing he was at the apartment. During rebuttal, the prosecution argued there was no evidence that there was surveillance video showing the front of Franco's apartment.

Franco raised his trial counsel's failure to object to evidence of the bloody jacket in his new trial motion. The trial court denied the motion.

b. *Analysis*

Franco contends that evidence of the bloody jacket should have been excluded from evidence as irrelevant, or more prejudicial than probative pursuant to Evidence Code section 352, and that his trial counsel provided ineffective assistance of counsel by failing to renew the defense's pretrial objections to the evidence during trial. We disagree.

First, the bloody jacket would not have properly been excluded from evidence as irrelevant, even if defense counsel had timely interposed objections on that basis. The People's theory of the case, it seems, or at least one of several alternative theories, was that Franco did not immediately rush the victim to the hospital after she was stabbed, as he tried to make it appear, but rather stopped at his apartment first. There was some circumstantial evidence in support of this theory, for example, the amount of time between the victim's appearance on the surveillance camera of the restaurant at 10:15 a.m. and their arrival at Loma Linda at approximately noon, the proximity of Franco's apartment to the restaurant, and Franco's arguably suspicious decision to drive the victim to the hospital himself, rather than call for emergency services. The jacket, belonging to the victim but stained with blood belonging to a male, was arguably another piece of evidence in support of the People's theory. Franco's evidence of an alternative, innocent explanation for the presence of the jacket in his apartment simply creates a factual dispute between the parties, of the sort normally left for the jury to decide. It did not render the

jacket irrelevant. As noted above, counsel does not render ineffective assistance by failing to take actions that would be futile, such as failing to interpose an objection that would be properly overruled. (See *People v. Price*, *supra*, 1 Cal.4th at p. 387.)

Second, even assuming for purposes of argument that Franco had conclusive evidence that the jacket had nothing to do with the victim's stabbing, and any evidence of it would have been properly excluded from the trial as irrelevant, we do not see any prejudice to Franco from its admission. The jury could determine the jacket was irrelevant if it believed Franco's view that it was bloodied by him following a car accident a few days before the murder. There is nothing inherently prejudicial about the presence of the jacket in Franco's apartment, as there would be if the evidence at issue were inflammatory. If anything, Franco benefitted from being able to point to an aspect of the prosecution's theory of the case that was contradicted by evidence other than his own self-interested testimony; that is, he offered evidence that the accident actually occurred. As such, we are not persuaded that the result at trial would have been any more favorable to Franco if defense counsel had successfully objected to evidence of the jacket.

We conclude that Franco's ineffective assistance claim based on failure to object to evidence of the bloody jacket is without merit.

C. *Vehicle Code Section 13350*

Franco argues that the trial court erred when it found that he used a motor vehicle in the commission of the offense. We reject Franco's argument.

In relevant part, Vehicle Code section 13350 provides that the Department of Motor Vehicles "immediately shall revoke the privilege of a person to drive a motor vehicle upon receipt of a duly certified abstract of record of a court showing that the person has been convicted of . . . [¶] . . . [¶] . . . [a] felony in the commission of which a motor vehicle is used . . . ." (Veh. Code, § 13350, subd. (a)(2).) This court has held that "in the context of Vehicle Code section 13350, the Legislature must have intended the term 'used' in the commission of a felony to mean that there was a nexus between the offense and the vehicle, not merely that a vehicle was incidental to the crime." (*People v. Poindexter* (1989) 210 Cal.App.3d 803, 808.)

The trial court did not err in finding there to be a sufficient nexus between the offense and the vehicle here. This is not a case where a car was used only to transport the defendant to and from the scene of the crime. (Cf. *People v. Poindexter*, *supra*, 210 Cal.App.3d at p. 808 [finding no nexus where car was used only as transportation and crime "was not carried out by means of the car, nor was the car used as an instrumentality in the crime"].) Franco not only used a car to transport himself to and from the crime scene. He also used a car in his attempt to conceal that a crime had been committed. (See *In re Gaspar D.* (1994) 22 Cal.App.4th 166, 170 [use of vehicle as transportation to and from crime scene plus "use of the vehicle to conceal the fruits of the crime" constitute sufficient nexus].) He used the victim's car to remove her from the location where she was stabbed, thereby complicating the investigation of what had happened. The knife that injured the victim was apparently discarded or otherwise removed from the car at some point during the drive between the initial crime scene and the hospital.

Franco's arrival at the hospital, driving the victim's vehicle and honking the horn to get the attention of emergency personnel, was also part of his attempt to pass himself off as the victim of a crime, rather than the perpetrator. On these facts, the trial court correctly determined that a motor vehicle had been used in the commission of the offense in the meaning of Vehicle Code section 13350.

III. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAPHAEL
J.

We concur:

CODRINGTON
Acting P. J.

FIELDS
J.